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Supreme Court, U.S.
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No. .....

IN THE

Supreme Court of the United States

October Term, 1984

ROCKWOOL INDUSTRIES, INC.,

Petitioner,

vs.

BLACK GOLD, LTD.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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SOP

QUESTIONS PRESENTED.

1. Can petitioner's election not to sell to respondent be inferred to be part of a conspiracy between petitioner and its other customers to induce them to adhere to an unlawful tying arrangement in violation of the Sherman Act Section 1 where there is no evidence of any tying arrangement between petitioner and any of its customers and no evidence that "tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently ... [and that] tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective' ". (*Monsanto v. Spray-Rite Corp.*, pp. 9 and 13)?

2. Is Sherman Act Section 1 violated for a refusal to deal when there is no competition for jobs in the only market in which respondent deals in petitioner's product?

3. Did the Court of Appeals improperly reverse the District Court's order dismissing respondent's purported claim of refusal to deal predicated upon a theory of antitrust liability when it was the Court of Appeals that raised the theory for the first time and which respondent never had pleaded, argued or pursued in the District Court or before the Court of Appeals?

4. Is a secondary line price discrimination claim actionable under Section 1 of the Sherman Act?

5. Is a litigant permitted to retry a price discrimination case a second time although it had an unfettered opportunity to prove that case in the first trial and failed to do so?

6. Is a secondary line price discrimination claim under Section 2(a) of the Robinson-Patman Act *de minimis* when the total price difference does not exceed $170?

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ROCKWOOL INDUSTRIES, INC.,

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vs.

BLACK GOLD, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Petitioner respectfully petitions this Court for a writ of certiorari on the grounds that the Court of Appeals' decision violated two principles basic to the preservation of competition and conflicts with the policy favoring judicial economy and the proper administration of justice, as follows:

First: The Court of Appeals' reversal of the District Court's order directing a verdict in favor of petitioner (defendant below) on respondent's (plaintiff below) claim that petitioner unlawfully refused to sell blown wool to respondent in violation of Section 1 of the Sherman Act was error because:

A. The Court of Appeals' reversal is predicated upon an inference of a conspiracy drawn from "highly ambiguous" evidence and would tend to discourage competitive enthusiasm in conflict with the principle enunciated by this Court in *Monsanto Co. v. Spray-Rite Service Corp.* (March 20, 1984) [reaffirming *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)], holding that a conspiracy between a manufacturer and

its customers must be proved by "evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." (*Monsanto*, p. 13)[1]

B. Petitioner's election not to sell to respondent could not restrain competition in violation of Sherman Act Section 1 because there was no competition for jobs in respondent's only market in which it dealt with petitioner's product.

C. The Court of Appeals' theory of petitioner's Sherman Act Section 1 liability for declining to sell to respondent is predicated upon an assumed conspiracy between petitioner and its other customers to induce adherence by such other customers to a tying arrangement, a theory which the Court of Appeals raised for the first time in conflict with the applicable decisions of this Court holding that where a theory had never been alleged, pleaded, pursued, or argued during pretrial, trial or post-trial proceedings nor presented or argued to the appellate court, it should decline to address the issue.

Second: The Court of Appeals' remand of respondent's claim of an asserted secondary line price discrimination claim under Section 1 of the Sherman Act was error because a secondary line price discrimination claim actionable under Section 1 of the Sherman Act conflicts with the Congressional intent embodied in the Robinson-Patman Act (15 U.S.C. §13(a)) as enunciated by this Court in *Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69, 82 (1979) (meeting competition) and *Gulf*

[1]All page references to *Monsanto* are to this Court's slip opinion.

Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200-201 (1974) (limiting jurisdiction) circumscribing the price controls that can be imposed upon a seller.

Third: The Court of Appeals' remand of the Section 2(a) Robinson-Patman Act claim was error because it ignored the principle of judicial economy prohibiting relitigating matters where a party had an unfettered opportunity to prove his case at the first trial and because the price difference at the most is $170 and *de minimis*.

JURISDICTION.

Jurisdiction in the United States District Court of the District of Colorado (the Court of first instance) was based on 28 U.S.C. §1337.

The petitioner's and respondent's appeal and cross-appeal from the judgment rendered in the District Court resulted in the Court of Appeals' judgment and opinion filed on March 9, 1984 and its addendum thereto on rehearing filed on April 18, 1984 reported at 729 F.2d 676 (1984) and 732 F.2d 779 (1984), respectively, and appear in Appendix A at pp. 1 to 21, *infra*.

Petitioner filed its Petition for Writ of Certiorari within ninety days of the Court of Appeals' addendum to the opinion filed on April 18, 1984. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED.

The text of the following pertinent statutory provisions are set forth in Appendix B, *infra*:

Sherman Act §1	15 U.S.C. §1
Clayton Act §4	15 U.S.C. §15
Clayton Act §2(a), as amended by the Robinson-Patman Act	15 U.S.C. §13(a)

STATEMENT OF THE CASE.

This case arises out of petitioner's election not to sell thermal insulation to respondent commencing in July, 1977 during an industry-wide shortage.

In the period of September, 1975 through February, 1979, the Colorado Public Service Company ("PSC"), a public utility supplying gas and electricity to Denver homeowners, conducted a program to induce homeowners to install thermal insulation in their homes as an energy conservation measure.

Petitioner manufactures thermal insulation from material of volcanic origin known generically as rockwool. Insulation is manufactured in two forms, as blown wool and batts. Blown wool is loose material that is blown into attics of existing homes while batts are solid insulation strips wrapped in foil and laid in place in new homes and buildings.

In addition to rockwool, thermal insulation also is made of fiberglass and cellulose manufactured by major corporations such as Johns-Manville, Owens-Corning and Certainteed in both the blown wool and batt forms. The fiberglass and cellulose insulation products comprise the majority of the thermal insulation manufactured and sold.

PSC's program called only for the installation of blown wool, not batts. PSC solicited homeowners to retrofit their homes with thermal insulation. PSC maintained a list of approximately fifteen installers approved to apply each type of insulation. Most, if not all, of the installers on PSC's list were approved to apply all three types of insulation.

These retrofit jobs were assigned by PSC to the installers on a rotating basis. The installers could use only the types of insulation approved by PSC and could not substitute another type of insulation for that specified by

the homeowner. Prices for each job were set by PSC. PSC paid all installers of the same type of material at the same rate. Thus, there was no price or other competition to obtain jobs in the PSC program.

To its eight customers in the PSC program including Black Gold, petitioner sold its products at the same price except to Williams Insulation to which petitioner sold at about 10% less to meet offers made to Williams by petitioner's competitors.

Black Gold initiated its purchase of blown wool from Rockwool in the fall of 1975 at the outset of the PSC program for use in the PSC program. Black Gold installed all of the blown wool it purchased from Rockwool in the PSC program except for an insignificant amount. (Myron Black, Tr. Vol. IX, 7:2-7; 15:22-16:6.)

Outside the PSC program, installers installed insulation in new construction consisting of buildings and homes. Blown wool and batts manufactured of rockwool, fiberglass and cellulose were employed in new construction.

Black Gold was a user of fiberglass insulation in the new construction market. Thus, Black Gold's suppliers were the manufacturers of fiberglass insulation.

Between November 26, 1975, when Black Gold first elected to purchase from Rockwool, and July 20, 1977 when Rockwool elected to stop selling to Black Gold, Black Gold's total insulation purchases were:

From Johns-Manville Owens-Corning and Certainteed	$2,229,562	96.1%
From Rockwool	88,471	3.9%
Total Purchases	$2,318,033	100 %

Commencing in mid-1976, Rockwool, like all other insulation manufacturers throughout the building industry, was unable to produce all the insulation needed to meet

the demand. (Tr. Vol. XI, 59:15-62:16; Def. Exh. I-8.) All of Rockwool's customers desired more blown wool than Rockwool could deliver. (Tr. Vol. VIII, 48:14-49:5; Vol. XI, 20:8-12; Vol. XIV, 23:12-22.) Public Service Company experienced job turndowns by installers of rockwool, fiberglass and cellulose blown wool because installers did not have the material on hand. (Tr. Vol. VIII, 97:11-98:16.) Finally, in the summer of 1977, Rockwool initiated an allocation program necessitated by the excess demand for insulation. (Tr. Vol. XI, 10:14-16:11; Pltf. Exh. 430.) As a result of the allocation program, Rockwool ceased accepting the orders of more than thirty of its customers, including Black Gold. (Tr. Vol. XI, 44:18-45:25; Def. Exh. B-10.)

That Black Gold's inability after July 20, 1977 to obtain supplies from Rockwool was not detrimental to Black Gold is demonstrated by Black Gold's increased sales and profits:

	Black Gold's Total Sales	Black Gold's Before Tax Profit or Loss
Full Year 1975	$ 474,790	$(15,570)
Full Year 1976	$1,213,875	$ 27,010
Full Year 1977	$2,525,875	$ 56,841
First 6 months 1978	$2,118,690	$386,051

Black Gold's claims and the Court of Appeals' decision thereon are as follows:

1. That Rockwool violated Section 2(a) of the Robinson-Patman Act by charging Black Gold a higher price than was charged to Williams and by the failure to make timely deliveries and sales in sufficient quantities of blown wool for the PSC program.

The Court of Appeal correctly decided:

(a) That the market within the PSC program was not competitive because the jobs were equitably offered

to all installers on a rotating basis without price competition and thus the price difference could not have affected competition within the PSC program (Opinion, p. 7);[2]

(b) That Rockwool's sale to Black Gold of less blown wool than Black Gold desired in essence alleges a refusal to deal and did not fall within the proscription of Section 2(a) because "when a seller refuses to sell to one buyer, the requisite price discrimination between two buyers is lacking"; (Opinion, pp. 10-11)

(c) That since Section 2(a) is "directed to price discrimination and nothing more", Section 2(a) was not violated by any discrimination in deliveries to Black Gold (Opinion, pp. 8-10); and

(d) That since all of the sales except those between November 26, 1975 and February 2, 1976 were wholly intrastate, no claim, therefore, could be founded on Section 2(a) (Opinion, p. 11).

2. That Rockwool violated Section 1 of the Sherman Act by entering into a "price discrimination conspiracy".

The appellate court correctly decided that since the discriminatory sales did not "tend to substantially lessen competition" under Section 2(a) of the Robinson-Patman Act *in the PSC program*, likewise Rockwool did not violate Section 1 of the Sherman Act by entering into a "price discrimination conspiracy". (Opinion, pp. 12-13)

3. That Rockwool's discriminatory sales of insulation to Black Gold installed *outside of the PSC program* violated Section 2(a) of the Robinson-Patman Act and Section 1 of the Sherman Act.

The appellate court erroneously decided that since the case had to be retried anyway on the refusal to deal

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[2]All page references to the Court of Appeals' Opinion are to Appendix A.

claim that these claims would be remanded for retrial. (Opinion, pp. 11-13)

4. That Rockwool violated Section 3 of the Clayton Act by tying the sale of batts to the sale of blown wool.

The appellate court correctly decided that there was no such tying violation of Section 3 "since Black Gold was neither a buyer nor a competing seller. It did not suffer the competitive injury that Section 3 was designed to prevent". (Opinion, pp. 13-16)

5. That Section 1 of the Sherman Act was violated by Rockwool's refusal to deal with Black Gold because of Black Gold's refusal to purchase batts from Rockwool as a condition to Rockwool's sale of blown wool.

Although the appellate court properly affirmed the District Court's holding that there was no contract, combination or conspiracy between Rockwool and Black Gold (Opinion, p. 19), it erroneously reversed the District Court's order granting Rockwool's motion to dismiss the claim because, according to the appellate court, the evidence was sufficient to sustain an inference that "Rockwool" used the refusal to deal with Black Gold to induce adherence by other [Rockwool] customers to a tying arrangement that violates the antitrust laws, . . ." (Opinion, p. 19)

This petition is directed only to the above items 3 and 5 which were decided erroneously by the appellate court.

ARGUMENT.

I.

SUMMARY OF ARGUMENT.

This case presents two principles basic to the preservation of free competition under the antitrust laws and a third principle basic to the administration of justice.

The first principle is that a manufacturer has a right independently to choose with whom it will deal and those persons with whom it will not deal and that that business freedom is essential to encourage and further business zeal. The inhibited exercise of that independent business judgment predicated on the existence of a conspiracy would emasculate the purposes of the Sherman Act absent evidence that tends to exclude the possibility of independent action by the manufacturer and its customers and that reasonably tends to prove that a manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. The Court of Appeals ignored that precept when it reversed and remanded for trial the propriety of petitioner's independent decision to elect not to sell to respondent predicated as the order was on the inference of a conspiracy drawn from "highly ambiguous" evidence that fails to exclude the possibility that petitioner acted independently and did not reasonably tend to prove that petitioner and its customers had a conscious commitment to a scheme to engage in unlawful tying.

Moreover, the Public Service Company awarded jobs by rotation at a set price and hence, there was no competition for jobs. Absent competition, there could be no restraint imposed by any refusal to deal.

The second principle is that a seller has the right to determine the prices at which it will sell its products except as proscribed by the Robinson-Patman Act which

imposes limitations upon a price discrimination suit in order to avoid rigid price control contrary to the aims of antitrust policy. The Robinson-Patman Act was enacted because the Sherman Act did not prohibit secondary line price discrimination. In enacting the Robinson-Patman Act, Congress circumscribed the price discrimination cause of action with limitations, such as, the seller's right to prove that its lower prices were offered to meet competition or were cost justified and Congress imposed the strict "in commerce" threshhold. Were there such a claim a disgruntled customer readily could avoid these limitations to a seller's right to determine its own prices simply by alleging that a secondary line price discrimination violates Sherman Act Section 1. The Court of Appeals' decision holding that a secondary line price discrimination may violate Sherman Act Section 1 conflicts with the Congressional intent embodied in the price discrimination provisions of the Robinson-Patman Act and the decisions of this Court.

Thirdly, judicial economy militates against the retrial of issues once tried particularly where the amount involved is *de minimis*. At the trial of the price discrimination issues, respondent offered no evidence that competition was affected or that respondent was injured by reason of petitioner's lower price to another customer and no reason exists to afford respondent a second opportunity.

II.

THE COURT OF APPEALS ERRONEOUSLY REVERSED THE DISTRICT COURT'S ORDER DIRECTING A VERDICT FOR ROCKWOOL ON BLACK GOLD'S REFUSAL TO DEAL CLAIM.

A. The Court of Appeals Ignores Monsanto vs. Spray-Rite and Permits Black Gold to Proceed Absent Evidence of a Conspiracy Between Rockwool and Its Customers That Excludes the Possibility That Rockwool and Its Other Customers Were Acting Independently.

The Court of Appeals' ruling and opinion conflict with this Court's recent decision in *Monsanto v. Spray-Rite.*

The Court of Appeals reversed the District Court's order directing a verdict and held that "the record contains sufficient evidence supporting the inference of a combination or conspiracy between Rockwool and other buyers to withstand a motion for directed verdict" (Opinion, p. 18) "... [because] under *Parke Davis* and its progeny, if Rockwool used the refusal to deal with Black Gold to induce adherence by other customers to a tying arrangement that violates the antitrust laws, Rockwool would be liable under Section 1 of the Sherman Act for unlawfully combining to restrain trade." (Opinion, p. 19)

In *Monsanto,* plaintiff Spray-Rite sued under Sherman Act Section 1 alleging Monsanto terminated Spray-Rite as an agricultural chemicals distributor pursuant to a conspiracy between Monsanto and its other dealers to fix, raise and stabilize resale prices because Spray-Rite was a price cutter that refused to adhere to Monsanto's "suggested" resale prices. This Court held that the evidentiary standard applied by the Court of Appeals ignored the distinction between concerted and independent action and that the proper

evidentiary standard imposes a higher burden of proof of a conspiracy between a manufacturer and its other distributors as follows:

> "... something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently ... The antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" (*Monsanto*, pp. 9, 13)

The Court of Appeals' ruling in the present case flatly contradicts the standard announced in *Monsanto* although that standard pointedly was drawn to the Court of Appeals' attention in Rockwool's petition for rehearing. (See Appendix A, pp. 20-21) The Court of Appeals reversed the directed verdict dismissing Rockwool and remanded for trial on the theory that although Black Gold refused to acquiesce to an alleged tying arrangement "other buyers agreed to the arrangement under threat of termination." (Opinion, p. 18) despite the total absence from the trial record of any of the kind of evidence required by *Monsanto* to infer a conspiracy.

The Court of Appeals below noted the evidence that it construed as supporting its theory of liability:

> "Rockwool communicated its desire to its customers that they purchase both blown wool and batts, and that Rockwool continued to sell blown wool to Williams and another competitor, both of whom bought batts. However, blown wool sales to Black Gold, which refused to buy batts from Rockwool, were terminated. The record also contains evidence allowing the inference that Rockwool participated

in an attempt to help Williams reacquire a former customer who had transferred its account to Black Gold. Black Gold did not use wool batts with this customer although Williams did." (Opinion, pp. 18-19)

However, that evidence is wholly insufficient under the *Monsanto* standard to infer a conspiracy to refuse to deal. The evidence does not show a "conscious commitment to a common scheme designed to achieve an unlawful objective." (*Monsanto,* p. 9) Nor does the evidence "exclude the possibility that the manufacturer and nonterminated distributors were acting independently." (*Monsanto,* p. 9)

First, there is no evidence whatsoever with respect to the circumstances under which any other Rockwool customer bought or declined to buy blown wool or that such customers bought or agreed to buy batts as a condition to purchasing blown wool pursuant "to a tying arrangement that violates the antitrust laws." (Opinion, p. 19) cf. *Jefferson Parish Hospital District No. 2 v. Hyde* (U.S. Supreme Court, March 27, 1984)

The Court of Appeals does not suggest and there is no evidence that Rockwool conspired to force its customers to accede to a tying arrangement, *i.e.*, communicated to its customers that they *must* purchase batts *as a condition* to obtaining blown wool.[3] There is no evidence that Rockwool threatened to cease blown wool sales to its other customers if they refused to buy batts. There is no evidence that customers entered into a conspiracy by yielding to threats from Rockwool (there were none) or that such "other buyers agreed to the [tying] arrange-

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[3]"... a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product ..." *Northern Pacific Railway v. U.S.*, 356 U.S. 1, 5 (1958)

ment under threat of termination." (Opinion, p. 18) Moreover, there is no evidence whatsoever that customers complained about Rockwool's sales of blown wool to Black Gold or invited, suggested or requested that Rockwool cease selling to Black Gold. The Court of Appeals' Opinion does not even suggest that the record contains any evidence of the foregoing conduct and there is none.

Second, as to the sufficiency of this evidence to support an inference of a combination or conspiracy between Rockwool and its other customers, this is the same sort of evidence that this Court condemned as "highly ambiguous" in *Monsanto*, p. 8.

Monsanto explicitly emphasized "the basic distinction between concerted and independent action — a distinction not always clearly drawn by parties and courts . . . A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)." (*Monsanto*, p. 6)[4]

The Court of Appeals, however, as a foundation for its decision, exhibited an attitude unwelcome to that doctrine when it said: "However, in cases coming after the articulation of the *Colgate* doctrine, the courts have narrowed the business conduct which *Colgate* protects, while broadening those practices deemed to constitute a conspiracy or combination within the meaning of Sherman 1." (Opinion, pp. 16-17) The Court of Appeals so spoke before *Monsanto* but intransigently declined on rehearing after *Monsanto* was brought to its attention to depart from that erroneous conclusion. With this denigration of *Colgate* as a starting point there is in the

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[4]This Court again emphasized the distinction between independent and concerted action in *Copperweld Corp.* v. *Independence Tube Corp.* (June 19, 1984) abrogating the intra-corporate conspiracy doctrine between a parent and wholly owned subsidiary.

Court of Appeals' decision "considerable danger that the doctrines enunciated in ... *Colgate* will be seriously eroded." (*Monsanto*, p. 8.)

Here, as well as under *Monsanto*, the "evidentiary standard adopted by the Court of Appeals ... disregards this danger." (*Monsanto*, p. 8) *Monsanto* instructs that: "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently ... the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" (*Monsanto*, p. 9.)

However, the Court of Appeals relies entirely on evidence wholly consistent with "the possibility that ... [Rockwool] and nonterminated distributors were acting independently." (*Monsanto*, p. 9)

The "highly ambiguous" evidence from which the Court of Appeals erroneously drew an inference of a conspiracy is quoted above and is limited to the following:

1. "[T]hat Rockwool communicated its desire to its customers that they purchase both blown wool and batts, and that Rockwool continued to sell blown wool to"... [two of its buyers] "both of whom bought batts." (Opinion, p. 18) Rockwool naturally and properly would "communicate its desire" that its customers buy blown wool and batts since Rockwool was engaged in the business of manufacturing and selling blown wool and batts. Certainly there is nothing more usual than that a seller has "communicated its desire to its customers" that they purchase the seller's products and that the purchase of such products resulted from the communication. That is the life of trade and the essence of free competition. The fact that Rockwool "communicated its desire" and that

its customers purchased both products does not exclude the possibility they acted independently or even suggest to the contrary. Continued sale of both product lines to some customers is not in the slightest probative of conspiracy or that such customers made purchases they otherwise would not have made.

2. "[T]hat Rockwool continued to sell blown wool to Williams and another competitor, both of whom bought batts. However, blown wool sales to Black Gold, which refused to buy batts from Rockwool, were terminated." (Opinion, p. 18) However, this does not support an "inference" that because Rockwool ceased selling blown wool to Black Gold that Rockwool did so pursuant to "a combination or conspiracy between Rockwool and other buyers." (Opinion, p. 18)

Monsanto points out (in the context of a claim asserting that the manufacturer had terminated the plaintiff price-cutting distributor in furtherance of a resale price fixing scheme) that the concept of "a meeting of the minds" or "a common scheme" in a distributor termination case includes more than a showing that the distributor conformed to the suggested price but rather "evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Monsanto,* p. 10, fn. 9. Here, there is no evidence that Rockwool sought to induce other customers to purchase batts as a condition to buying blown wool. Nor is there evidence that such other customers did any more than purchase batts in the exercise of an independent decision to do so. The fact that such customers did so in no way excludes the possibility that they were acting independently.

3. "[T]hat Rockwool participated in an attempt to help Williams [a customer of Rockwool] reacquire a former customer who had transferred its account to

Black Gold." (Opinion, p. 19) The fact is as the evidence shows that Rockwool's efforts were unsuccessful. Williams never reacquired the former customer. In any event, nothing illegal occurred. Ford Motor Company, competitively and properly, constantly urges Chrysler and GM car owners to switch or to return to Ford dealers. As the Court of Appeals recognized here, "Black Gold did not use [Rock]wool batts with this customer although Williams did." (Opinion, p. 19) The Court of Appeals mistakenly assumes that under the antitrust laws Rockwool was prohibited from engaging in any competitive effort to help Williams to regain its lost customer for Rockwool products in favor of avoiding any competition with Black Gold's sales to the customer of fiberglass insulation products manufactured by Rockwool's competitors, Johns-Manville, Owens-Corning or Certainteed.

4. On rehearing, the Court of Appeals' addendum added the concept that cutting off a non-acquiescing customer during a time of short supply "is probative evidence of concerted action" and relied upon footnote 10 in *Monsanto* for that conclusion. (Addendum, p.21) However, footnote 10 was useful in *Monsanto* only as an *addition* to "substantial *direct* evidence of agreements to maintain prices" (*Monsanto*, p. 10, emphasis in original). Unilateral termination during time of short supply cannot alone, at least in a non-price case, furnish "evidence sufficient to carry . . . [plaintiff's] burden of proving that there was such an agreement" (*Monsanto*, p. 8) or "to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective' " (*Monsanto*, p. 9). Here, there was no price fixing and there was conclusive evidence of a severe shortage of material. Given the excess demand and severe shortage of supply to fill all orders, Rockwool's unilateral action in restricting supply was compelled.

Refusal of orders was inherent in the situation. Given the circumstances, there is no basis on which to conclude that simply declining to sell to a customer when demand exceeds supply "is probative evidence of concerted action" in violation of the antitrust laws. (Court of Appeals, Addendum, p. 21).[5]

The distinction between a manufacturer's imposition of a fixed price at which its distributor may sell and a manufacturer's limitation of the quantity it sells to its customers during a time of short supply is significant.

A price fixing plan is adopted at the manufacturer's instigation and is designed to stabilize the market, to maximize the manufacturer's profit or to prevent interference in the market by "free-riders". In contrast, the inability to meet demand faced by Rockwool was imposed by economic circumstances entirely beyond Rockwool's control and prevented it from filling the orders of its customers. Since the volume of the orders exceeded the supply, some refusal to sell was the only choice. As *Monsanto,* p. 6 shows, Rockwool was permitted to choose its customers and to adopt a plan which would favor its long-time loyal customers.

And Rockwool's election to decline to sell to Black Gold was perfectly legal.[6] Otherwise the conclusion is inescapable that the Court at the behest of a disgruntled customer would be faced with conceiving a plan for

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[5]The record below shows that Rockwool ceased accepting orders from thirty other customers concurrent with its election to decline to sell to Black Gold (Tr. Vol. XI, 44:18-45:25; 59:15-62:16). There is not one iota of evidence to show that one of these customers was cut off because of a refusal to buy batts. Instead, the record amply reflects the unprecedented demand for insulation which made it impossible for Rockwool to fill all of its customers' orders.

[6]The evidence of "conspiracy" relied on by the Court of Appeals contrasts starkly with the evidence this Court found sufficient in *Monsanto.* In *Monsanto, first,* there was substantial direct evidence

distribution in times of short supply. The Court would become a commercial regulator of the demands of each manufacturer's customers.

Moreover, the uncontroverted evidence disproves to a certainty the Court of Appeals' theory that Rockwool conspired to "refus[e] to deal with Black Gold to induce adherence by other customers to a tying arrangement ..." (Opinion, p. 19) whereby Rockwool conditioned the sale of blown wool upon the purchase of batts.

a. By September 1977, and despite 4 shifts per day, 7 days per week (sales to Black Gold ceased in August 1977), Rockwool's production had fallen far behind demand. Rockwool's production shortfall in batts greatly exceeded the shortfall in blown wool. The following table, drawn from the uncontradicted

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of a price-fixing conspiracy between the manufacturer and the non-terminated dealers. The manufacturer's District Manager testified that other price-cutting distributors were told by Monsanto to maintain the suggested prices or lose their supply. When one distributor refused, Monsanto complained to the distributor's parent. The parent thereafter instructed the distributor to comply, and the distributor confirmed to Monsanto that it would comply. Further, a newsletter from a Monsanto distributor, written after a meeting between the author and Monsanto, discussed Monsanto's efforts to "get the marketplace in order." The newsletter related an assurance by Monsanto to the author that Monsanto's company-owned outlets would not sell below the suggested retail prices. *Second*, the *Monsanto* record also strongly showed that plaintiff was terminated pursuant to the conspiracy between Monsanto and the other distributors. A former Monsanto salesman testified that a Monsanto representative before termination several times advised plaintiff of complaints from other dealers, and requested that plaintiff maintain suggested retail prices. Later, Monsanto officials explicitly threatened to terminate plaintiff unless it raised its prices. And following plaintiff's termination a Monsanto official remarked to plaintiff's president about the many complaints that Monsanto had received from its dealers about plaintiff's prices, yet the official never discussed with plaintiff the other criteria which Monsanto later alleged were the basis for termination.

The record in the present case contains no evidence of conspiracy like that presented in *Monsanto*.

testimony of Rockwool's Sales Manager Mr. Balter (Tr. Vol. XI, 61:8-17), illustrates:

Rockwool's Production v. Demand

September 1977

(Truckloads Per Month)

	Demand	Production		Shortfall
Batts	327	196	(59% of demand)	131
Blown Wool	200	139.5	(69% of demand)	60.5

b. Of the approximately 100 customers serviced by Rockwool's Pueblo Plant during the period of most acute shortage (commencing September 1977) 21 customers purchased *blown wool only*, while 25 customers purchased *batts only*. (Tr. Vol. XI, 42-43; Exhibit B-9).

This factual backdrop renders the Court of Appeals' theory of a "conspiracy" a logical absurdity. It is inconceivable that Rockwool, while experiencing a production shortfall of 131 truckloads of batts per month, more than twice its 60 truckload shortfall of blown wool, nonetheless, would conspire to tie batts to blown wool to compel its customers to purchase batts.[7]

Monsanto and *Copperweld* make clear that *Colgate* is the law and that an antitrust plaintiff is required still to carry its burden to prove a conspiracy. (*Monsanto*, p. 6). The Court of Appeals' failure to understand and apply *Colgate* led to the very kind of error *Monsanto* sought to eliminate. *Cf. First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 287 (1968).

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[7]One reason *why* the Court of Appeals overlooked this overwhelming evidence which utterly negates its hypothetical conspiracy is because, as set forth in detail in the next section of this petition, respondent did not assert the theory, either in its pleadings, or at trial, or before the Court of Appeals. Thus, Rockwool never was called upon to focus the Court of Appeals' attention on that evidence.

B. A Refusal to Sell to Black Gold Could Impose No Restraint on Competition.

Rockwool's inability to meet demand following the first half of 1977, did not result in any lessening of the supply available for the PSC program, nor did it result in any change in price because the selling price was determined by PSC, nor did it result in a change in any other aspect of the PSC program. Given that Public Service Company awarded the jobs by rotation, there was no competition for jobs in the PSC program and hence no restraint on competition.

Thus, even had Rockwool and one or more of Black Gold's competitors conspired to cut off Black Gold's supply of blown wool for sale into the PSC program, there would have been no reasonable, or indeed unreasonable restraint on competition. As the Court of Appeals correctly recognized the antitrust laws react not to injury to competitors but to injury to competition. (Opinion, p. 6) The extent of any damage to Black Gold becomes immaterial. As the Court of Appeals correctly held respecting Black Gold's price discrimination claims under the Robinson-Patman Act and Sherman Act Section 1:

> "Accordingly, our determination that the discriminatory sales *within the PSC program* did not violate the Robinson-Patman Act for lack of competitive effect is equally applicable to the alleged Sherman 1 violation." (Opinion, p. 12)

Like the discriminatory price, in the PSC program the discrimination in quantities would not entitle Black Gold to recovery under Sherman Act Section 1 since

both the price and the available supply to the PSC program remained unaffected by any refusal to sell to Black Gold.

In the new construction market, Black Gold's only purchases were from the nation-wide suppliers, Johns-Manville, Owens-Corning and Certainteed, not Rockwool. Black Gold had no history of purchasing and installing Rockwool blown wool in new construction. (Myron Black, Tr. Vol. IX, 15:22-16:6.) In fact Myron Black testified he told Rockwool his only need for Rockwool blown wool was in the Public Service program. (Tr. Vol. IX, 7:15-19.) Black Gold's actual purchases from the fiberglass suppliers is indicative. See, p. 5, *supra*.

Thus, Rockwool's election not to sell to Black Gold could have had no impact upon Black Gold's supplies for the new construction market and could have imposed no restraint on competition.

C. The Court of Appeals Raised for the First Time the Claim That Rockwool Refused to Deal in Furtherance of a Conspiracy With Other Buyers.

Four years after a full dress jury trial in the District Court in 1980 and six years after this action was commenced in 1978, the Court of Appeals remands this case to the District Court for another trial on a claim Black Gold never brought.

In Section IV of its opinion, the Court of Appeals remands the case back to the District Court for retrial on the legal and factual theory whether petitioner's election not to sell to respondent was pursuant to "a combination or conspiracy between Rockwool and other buyers" wherein "other buyers agreed to the [tying] arrangement under threat of termination." (Opinion, p. 18)

The possibility that such a combination or conspiracy existed was raised for the first time by the Court of Appeals. The only conspiracy Black Gold's complaint alleges between Rockwool and its customers (other than Black Gold) was an alleged price discrimination conspiracy between Rockwool and Williams in the second count of the complaint. (Tr. Vol. I, 128, 137-138) A copy of the complaint appears in Appendix C at pp. 25-42, *infra*. At the trial, Black Gold's counsel urged that this "conspiracy" between Rockwool, as seller, and Williams, as buyer, alleged in in count two of the Complaint, gave rise to Section 1 Sherman Act price discrimination liability predicated on identical facts as those asserted in Black Gold's Robinson-Patman Act Section 2(a) claim. (Tr. Vol. XV, 29:21-30:1 quoted on page 24, *infra*)

A claim of a refusal to deal pursuant to a conspiracy between Rockwool and its other customers was not alleged.[8] Nor does such a claim appear in any pretrial brief, in any statements to the jury (see Black Gold's Opening Statement, Tr. Vol. V, 52-75), or in any of Black Gold's briefs submitted to this Court.

The Court of Appeals' order remanding the case for retrial on a Sherman Act theory of liability which was never alleged, tried or urged before the District Court nor raised by Black Gold before the Court of Appeals conflicts with the many decisions of this Court and the appellate courts that decline to reach an issue that was never before presented or argued by the parties. *Monsanto*, fn. 6. Moreover, as this Court pointed out in *Associated General Contractors v. Carpenters*, ____ U.S.

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[8]The fourth count of Black Gold's first amended complaint (Appendix C, pp. 37-38) alleges Rockwool refused to deal in violation of Section 1 of the Sherman Act pursuant to an alleged tying arrangement between Rockwool and Black Gold. The Court of Appeals properly affirmed the District Court's order dismissing the tying claim. (Opinion, pp. 13-16)

——, 74 L.Ed.2d 723, 731 (1983), it is not proper to assume that a plaintiff can prove facts that it has not alleged. Nor is it proper that petitioner should be put to the expense of further litigation possibly for many more years defending against a claim that respondent never urged.

III.

THE COURT OF APPEALS' ERRONEOUS REMAND OF BLACK GOLD'S SHERMAN ACT SECTION 1 SECONDARY LINE PRICE DISCRIMINATION CLAIM CONFLICTS WITH CONGRESS' INTENT AS EMBODIED IN THE ROBINSON-PATMAN ACT AND THE DECISIONS OF THIS COURT.

Black Gold's counsel stated to the District Court that Black Gold's Sherman Act §1 secondary line price discrimination claim was based on the identical conduct alleged to violate the Robinson-Patman Act:

> "Black Gold can assert that there was a conspiracy between Rockwool and Williams which is actionable under the Sherman Act, which carries under it conduct virtually identical to the price discrimination allegations under the Robinson-Patman Act." (Tr. Vol. XV, 29:21-30:1)

However, the history of the Sherman Act and the subsequent enactment of the Robinson-Patman Act militate against any such conclusion.

The Sherman Act was enacted in 1890. Congress enacted §2(a) of the Clayton Act in 1914 and amended it by the Robinson-Patman Act in 1936 precisely because the Sherman Act did not bar price discrimination. Congressman Patman, co-author of the Robinson-Patman Act, explains this history in his book *Complete Guide to the Robinson-Patman Act*, published in 1963, at p. 5:

> "In the course of its study of price discrimination, Congress found that the practice was springing up

in various industries. It was in that setting in 1911 that the Supreme Court of the United States approved the action brought by the government under the Sherman Act to subdivide the Standard Oil Company.

The order of the court breaking up the Standard Oil Trust did not provide for ending Standard Oil's practice of price discrimination. In fact, the Sherman Act contains no provisions prohibiting that practice ...

At the opening of the 63rd Congress in 1913, President Wilson, in one of his first messages, called for legislation to prohibit price discrimination ...

Congress was responsive to that call for legislation ..."

Congressman Robinson, co-author of the Act, similarly commented:

"As our country developed, it was found that the antitrust laws did not meet a number of new conditions and situations and therefore in 1914 Congress passed what is known as the Clayton Amendment to the Sherman Antitrust Law." 80 Cong. Rec. 8129 (May 27, 1936) (remarks by Congressman Robinson).

Recently, in *Crowl Distributing Corp. v. Singer Co.*, 543 F.Supp. 1033, 1037 (D. Kansas, 1982), the court granted defendant's motion for summary judgment on plaintiff's claims that the defendant supplier discriminated in price between plaintiff and plaintiff's competitor in violation of the Sherman Act and observed:

"Of course, price discrimination *per se* has never been considered to fall within the scope of the Sherman Act, *see State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 462-64, 381 N.Y.S.2d 426, 427-28; 344 N.E.2d 357, 358-59 (1976); indeed, the Robinson-Patman Act was enacted precisely in order to fill a perceived

loophole in the pre-existing antitrust laws. *See generally,* F. Rowe, Price Discrimination Under the Robinson-Patman Act, 11-23 (1962). While it is possible that in primary-line injury cases there may be some overlap between the Robinson-Patman violations and Sherman Act 'predatory pricing,' *see* P. Areeda, Antitrust Analysis §710(e) (3d Ed. 1981), the Court has been unable to unearth any authority that even hints at the possibility that the Sherman Act prohibitions might encompass secondary-line price discrimination such as alleged here."

Hansen Packing v. Armour & Co., 16 F.Supp. 784, 787 (S.D.N.Y. 1936) held consistent with the foregoing at 16 F.Supp. at 787:

"In each of the two causes of action the plaintiff charges the Illinois Corporation with violations of the Sherman Antitrust Act and of Section 2 of the Clayton Act. In his memorandum in opposition to the defendant's motion, the plaintiff explains that he is seeking recovery only for the defendant's alleged price discrimination; nevertheless the right to recover is predicated upon both the Sherman Antitrust and Clayton Act [as amended to include Robinson-Patman] ... the plaintiff has no remedy at all under the Sherman Antitrust Act for price discrimination...."

Congress circumscribed the secondary line price discrimination cause of action under §2(a) of the Robinson-Patman Act with limitations not imposed by the Sherman Act and this Court has upheld those limitations. For example, the Act confers on the seller the right to prove that the lower price was justified by lower costs, the right to prove that the seller's lower prices were offered to meet competition (*Great Atlantic & Pacific Tea Co., Inc. v. FTC,* 440 U.S. 69, 82 (1979) in which this Court

applied the meeting competition provision of the Robinson-Patman Act and noted its concern that application of rigid price control was contrary to the basic aims of antitrust policy) and the Act imposes the strict "in commerce" jurisdictional threshold. (*Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200-201 (1974) rejecting the contention that §2(a) jurisdiction was co-extensive with Sherman Act jurisdiction and held that Robinson-Patman Act §2(a) applies only where "at least one of the two transactions which, when compared, generate a discrimination . . . cross[es] a state line." 419 U.S. at 200-201).

The Court of Appeals below noted the jurisdictional difference between the Sherman and the Robinson-Patman Acts (Opinion, pp. 12-13) and, nonetheless, permitted Black Gold to try its price discrimination claim under the Sherman Act's broad "affecting interstate commerce" jurisdiction as opposed to the narrow Robinson-Patman jurisdiction delineated in *Gulf Oil Corp. v. Copp Paving Co., supra.*

The Court of Appeals would permit Black Gold to avoid the Robinson-Patman strictures simply by alleging a "price conspiracy" between buyer and seller violates the Sherman Act. No court ever has permitted a plaintiff to do so before. Moreover, Black Gold alleges a Robinson-Patman price discrimination claim under §2(a) on the identical facts and no purpose would be served by permitting the claim to proceed under the Sherman Act.

IV.

THE COURT OF APPEALS ERRONEOUSLY REMANDED THE SECTION 2(a) ROBINSON-PATMAN CLAIM AS TO SALES OUTSIDE THE PSC PROGRAM.

The Court of Appeals held that because there was no price competition in the PSC program the price difference could not have affected competition in the PSC pro-

gram but since "the case must be retried" on the refusal to deal claim, Black Gold should have the opportunity on a retrial to establish injury under Section 2(a) of the Robinson-Patman Act as to price discrimination on sales outside of the PSC program. (Opinion, p. 11)

A. Respondent Did Not Assert nor Offer Evidence of Cognizable Injury Attributable to the Lower Price to Williams at the First Trial.

In the District Court, the Robinson-Patman claim was fully tried. Respondent did not assert it was injured in the market outside of the PSC program by reason of any anticompetitive effect attributable to petitioner's lower price to Williams. Black Gold's only asserted damage attributable to the price difference was the price difference itself, so-called "automatic damages." *J. Truett Payne Co., Inc. v. Chrysler Motors Corporation,* 451 U.S. 557 (1981) unanimously rejected such automatic damages premised upon mere proof of a price difference. 451 U.S. at 561.

As to any loss of sales and profits outside the PSC program because of the lower price to Williams, the only evidence came from Black Gold's president, Myron Black who could not recall that he ever lost a job:

> "QUESTION: For the same period (November 1975 through August 1977) and again excluding the Public Service Company work, do you recall any occasion when Black Gold lost a customer to Williams Insulation which you think was caused by the difference in price you contend was charged by Rockwool to Black Gold and Williams?
>
> "ANSWER: I don't recall any, specifically." (Tr. Vol. XIV, 34:10-15)

The reason is that as to the market outside of the PSC program in the new home and building construction

market, Black Gold installed only fiberglass blown wool purchased from suppliers other than Rockwool, except for "a couple of jobs." (Tr. Vol. IX, 15:17-16:6) Myron Black testified:

> "Q. But apart from those couple of jobs, all of the blowing wool that you used outside the Public Service Company program was obtained from suppliers other than Rockwool?
>
> A. Yes." (Tr. Vol. IX, 16:3-7)

Black Gold offered no evidence it purchased Rockwool blown wool for use in new construction that it was unable to sell and thereby lost sales and profits to prove injury in the market outside the PSC program attributable to the lower price to Williams.

There is no reason why Black Gold should have a second opportunity to prove lost profits attributable to a price difference when it did not and could not prove that in the first trial.

B. Any Impact of the Price Difference in the New Construction Market Was De Minimis.

The amounts involved are *de minimis*. Black Gold concedes that 95% of the blown wool purchased from Rockwool was used in the PSC program. (Black Gold's Opening Brief before the Court of Appeals, p. 17) Black Gold at the most purchased only 5% of $33,943 (between November 26, 1975 and February 2, 1976) or $1,700 of blown wool for jobs outside the PSC program. Black Gold paid 10% or only $170.00 more than the prices Rockwool charged Williams.

The *de minimis* principle applies to Section 2(a). *Food Basket Inc. v. Albertson's Inc.*, 383 F.2d 785, 788 (10th Cir. 1967) (affirming summary judgment dismissing §2(a) claim where amount was trivial); *Baldwin Hills*

Building Material Co. v. Fibreboard Paper Prod. Corp., 283 F.Supp. 202, 205 (C.D. Cal. 1968) (granting summary judgment where amounts were *de minimis*).

CONCLUSION.

Petitioner respectfully requests that this Court issue its writ directing the Court of Appeals to vacate its order reversing the District Court's dismissal of respondent's refusal to deal claim and directing the Court of Appeals to dismiss the Robinson-Patman Act and Sherman Act Section 1 price discrimination claims.

Respectfully submitted,
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APPENDIX "A".

Slip Opinion.

United States Court of Appeals, Tenth Circuit.

Black Gold, Ltd., a Colorado corporation, Plaintiff-Appellee and Cross-Appellant, v. Rockwool Industries, Inc., a Delaware corporation, Defendant-Appellant and Cross-Appellee. Nos. 80-2098, 80-2143, 82-1176, 82-1177.

Filed: March 9, 1984.

Appeal from the United States District Court for the District of Colorado (D.C. No. 78-K-578).

Kenneth R. Bennington of Brownstein Hyatt Farber & Madden, Denver, Colorado (John W. Madden III, Esq. with him on the brief; Thomas D. Smart, Jr. of Smart, DeFurio & Brooks, & Eklund, Denver, Colorado, also with him on the brief), for Black Gold, Ltd.

John G. Wigmore of Lawler, Felix & Hall, Los Angeles, California (Richard C. Neal with him on the brief; Jeffrey L. Smith and John P. Congdon of Cohen, Brame, Smith & Krendl, Denver, Colorado, also with him on the brief), for Rockwool Industries, Inc.

Before DOYLE, McKAY, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Black Gold, Ltd. (Black Gold) brought this private antitrust action against Rockwool Industries, Inc. (Rockwool) for damages resulting from alleged violations of section 1 of the Sherman Act, 15 U.S.C. §1 (1982), section 2(a) of the Clayton At, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a), and section 3 of the Clayton Act, 15 U.S.C. §14. After all the evidence had been presented to a jury, the district court directed a verdict for Rockwool on claims alleging an illegal tying arrangement and a refusal to deal, and sent the remaining two claims based on price discrimination to the jury. The jury returned a general verdict in favor of Black Gold.

Both parties have appealed. We affirm in part, reverse in part, and remand for a new trial.

I.

BACKGROUND

The stipulated facts giving rise to this controversy are as follows. Black Gold is in the business of installing insulation in both new construction and existing structures. Rockwool manufactures, sells, and distributes an insulating material generically known as rockwool for use in both new and existing buildings. Williams Insulation Company (Williams), a competitor of Black Gold, also installs insulation in new and existing buildings.

Both Black Gold and Williams bought insulating material from Rockwool during the relevant time. This material comes in two forms, blown wool and batts. Blown wool is loose and is blown into the attics of existing buildings. Batts are thick strips or pads wrapped in paper or foil and are used in new construction.

Between September 1975 and February 1979, Public Service Company of Colorado (PSC), a public utility supplying gas and electricity to Colorado consumers, operated a program to provide its residential customers an opportunity to upgrade their home insulation. Under the program, customers could choose to have either rockwool, fiberglass, or cellulose insulation retrofitted into their homes.

PSC maintained lists of installers approved to apply each type of insulation, and offered retrofitting jobs in the Denver metropolitan area to installers on a rotating basis. Installers could only use types and brands of insulation specifically approved by PSC, and could not substitute another type of insulation for that specified by the homeowner. Prices for the jobs were set by PSC. Although the price varied according to the type of in-

sulation installed, all installers of the same type of material were paid at the same rate.

The only brand of rockwool insulating material approved for use in the PSC program was that manufactured by Rockwool. Both Black Gold and Williams were qualified to install rockwool in the PSC program and both bought blown wool from Rockwool to use in the program. Rockwool stipulated that during the PSC program it regularly sold both blown wool and batts to Williams at a lower price than it offered to Black Gold.

At trial, Black Gold offered evidence tending to support the following allegations. Rockwool was unable to sell as great a quantity of batts insulation as it wished because of a slump in new construction that occurred during the time the PSC program was in effect. Because the PSC program involved the insulation of older homes rather than new construction, batts were not used in the program. By contrast, Rockwool's blown wool was selling rapidly due to the demand created by the PSC program. Black Gold alleges that Rockwool attempted to coerce Black Gold to purchase batts by withholding timely delivery of blown wool which Black Gold needed to participate in the PSC program. Except for a small test shipment, however, Black Gold refused to buy rockwool batts from Rockwool, allegedly because Black Gold believed fiberglass batts were a superior product and because Rockwool would not sell its batts to Black Gold at as low a price as it sold them to Black Gold's competitor Williams. Rockwool ultimately terminated its sale of blown wool to Black Gold, although it continued sales to Williams and another competing installer, both of whom regularly purchased batts. Black Gold testified that it was forced to refuse many jobs in the PSC program because it could not obtain blown wool from Rockwool. Virtually all of the blown wool that Black Gold

had been able to obtain from Rockwool was used in the PSC program.

In the proceedings below, Black Gold claimed that Rockwool practiced price discrimination in violation of section 2(a)[1] by selling blown wool to Williams at a lower price than it sold the material to Black Gold, by refusing to sell batts to Black Gold at as low a price as it gave Williams, by failing to make timely deliveries of blown wool, and by refusing to sell blown wool to Black Gold. Black Gold also contended that Rockwool and Williams conspired to give Williams a competitive advantage by this price discrimination in violation of section 1 of the Sherman Act. Black Gold further claimed that Rockwool violated section 3 of the Clayton Act by tying the sale of blown wool to the sale of batts. Finally, Black Gold alleged that Rockwool's refusal to deal with Black Gold was in furtherance of the tying arrangement and amounted to a conspiracy in restraint of trade in violation of section 1 of the Sherman Act.

The trial court directed a verdict for Rockwool on the alleged tying arrangement because the court found no evidence of any anticompetitive effect. The court also directed a verdict for Rockwool on the claimed refusal to deal, finding no evidence of a contract, combination, or conspiracy. The two claims based on price discrimination went to the jury, which returned a general verdict for Black Gold in the amount of $93,350. The verdict was trebled to $280,050.

II.

THE PRICE DISCRIMINATION CLAIMS.

A. The Robinson-Patman Claim

As noted above, the alleged illegal conduct under the Robinson-Patman Act was one of two price discrimination claims upon which the jury returned a general

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[1]The Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13, 13a, 13b, 21a (1982), amended section 2(a) of the Clayton Act. The provision will be referred to in this opinion simply as section 2(a).

verdict in favor of Black Gold. On appeal, Rockwool contends that its lower price to Williams did not constitute a violation of the Act because, under the method by which the PSC program was administered, the price difference did not tend to lessen competition as required by the Act. In addition, Rockwool contends that the court improperly instructed the jury that price discrimination under the Act can include discrimination with respect to timely deliveries and with respect to the amounts sold. Finally, Rockwool alleges that the court lacked jurisdiction under the Robinson-Patman Act for those sales which were entirely intrastate.[2]

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides in relevant part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or

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[2]Rockwool also contends that the district court improperly instructed the jury on Rockwool's claim that its lower prices to Williams were made in good faith to meet competition within the meaning of section 2(b) of the Clayton Act, as amended. Rockwool alternatively argues that the court should have sustained this defense as a matter of law.

Rockwool further contends that Black Gold failed to prove the fact of injury from the alleged discrimination so as to be entitled to damages under section 4 of the Clayton Act. Rockwool claims that the district court's instructions on calculating damages in effect allowed Black Gold to recover without making the requisite showing. Rockwool also argues that even if the fact of injury had been shown, the amount of damages awarded was speculative and without support in the record. Given our disposition of the price discrimination claims, we do not address these contentions on appeal.

> any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

15 U.S.C. §13(a).

The primary purpose of the Act is to protect the competitive process, not individual competitors. *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 547-48 (9th Cir. 1983); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 954 (10th Cir. 1959); 4 J. von Kalinowski, Antitrust Laws and Trade Regulation §28.03 (1983). Thus, to establish a violation of this provision, Black Gold must show that the price differential in this case had the requisite potential to substantially affect competition. *See Foremost Pro Color*, 703 F.2d at 547-48; *Williams Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1040 (9th Cir. 1981) *cert. denied*, 103 S. Ct. 57, 58 (1982); *M. C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1066 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976); *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964); *see generally* 4 J. von Kalinowski, *supra*, §23.02[2] (1982).

> "Even if the sales at different prices are contemporaneous, involve goods of like grade and quality, the price distinction is not justified by good business cause, and it causes injury to the disadvantaged purchaser, recovery under the Act is precluded absent proof that the price variance detrimentally affected competition."

M. C. Manufacturing Co., 517 F.2d at 1066.

Given the unusual and uncontroverted facts in this case, we must conclude that the price differential on blown wool purchased for use in the PSC program could not have adversely affected competition *within the program*. The price for installing each type of insulation was set by PSC and was uniformly applied to all installers. Moreover, the jobs for installing each type of insulation were equitably offered to listed installers on a rotating basis. Under this scheme, Williams could not divert sales from Black Gold by lowering its price as a result of its favored position.

Black Gold argues on appeal that an effect on competition may be shown even if the favored purchaser does not lower the resale price of the goods. In addressing this argument, it is important to distinguish between injury to competition and injury to a competitor. The courts have generally been willing under some circumstances to infer injury to competition even when resale prices between favored and disfavored purchasers remain the same. *See* L. Sullivan, Handbook of the Law of Antitrust §224 (1977); 1 ABA Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy and Law 99 (1980). Such an inference may be supportable because "[t]o the extent a disfavored purchaser must pay more for its goods than its competitors, it is less able to compete. It has fewer funds available with which to advertise, make capital expenditures, and the like." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 564 n.4 (1981). In the usual competitive market, when a competitor is thus less able to compete, competition itself may often be affected.

In the case before us, however, although Black Gold may have realized a lower profit margin from its PSC jobs than did its competitors, there is no evidence showing that Black Gold's lower profits had any impact upon

its ability to compete in the PSC program. Black Gold's president and chief operating executive officer testified that Black Gold incurred no sales costs, advertising costs, or collection expenses in connection with the PSC program, and that the PSC jobs were "quite a lot more profitable" than outside jobs. Rec., vol. IX, at 6. We conclude that although the price differential may have resulted in lower profits from the PSC jobs for Black Gold than for Williams, these lower profits could not have produced an effect on competition within the program.[3]

Both before the trial court and on appeal Black Gold has asserted that the requisite competitive injury can be established by Rockwool's failure to make timely deliveries of the blown wool ordered by Black Gold for the PSC jobs and from Rockwool's ultimate refusal to fill Black Gold's blown wool orders. Black Gold presented evidence at trial that it had to refuse a substantial number of PSC jobs because it was unable to obtain blown wool, and that these jobs were distributed to its competitors on a rotating basis. Indeed Black Gold has consistently claimed that the primary cause of its injury was not the price it paid for the material it did receive, but rather its inability to obtain timely and sufficient quantities of blown wool for the program at any price.

The district court apparently agreed that these injuries constitute price discrimination under the Act and accordingly instructed the jury as follows:

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[3]We recognize that the lower profits obtained by Black Gold *within* the PSC program might have detrimentally affected its ability to compete *outside* the program. However, Black Gold did not raise this argument on appeal.

Black Gold also argues that the discriminatory pricing had an impact on the price set by PSC for installing all rockwool insulation in the program and cites evidence in support of this allegation. Given our analysis of the particular market dynamics in this case, we conclude that this fact, even if true, is irrelevant to our consideration of competitive impact.

> " 'Price discrimination,' as that term is used in the statute, simply means that a seller of a commodity gives to one of its purchasers an advantage in price, terms and conditions not accorded or given to other purchasers. Thus, the term 'price discrimination' includes more than simply discrimination as to the unit price of the commodity involved. The advantage may be given by lower prices, discounts or *other advantages, such as timely delivery given to the favored purchaser and not given to the others.*"

Rec., vol. XV, at 155 (emphasis added).

> "You are instructed that it is sufficient if Black Gold and Williams engaged in forms of competition, other than simply price competition. In addition to price competition, you may consider whether Black Gold and Williams engaged in other forms of *competition based on their ability to have the needed insulation on hand to install when required*, or based on their ability to provide the services and quality of services demanded by their customers."

Id. at 157 (emphasis added). Rockwool argues that the untimely deliveries and refusal to deal in this case are not price discriminations within the meaning of the Robinson-Patman Act, and that the trial court's instructions on these issues were erroneous. We agree.

Section 2(a) is directed to price discrimination and nothing more. Price is to be determined by reference to the invoice submitted to the buyer, and "any discounts, offsets, or allowances not reflected in the invoice price." 4 J. von Kalinowski, *supra* §27.03[2]. Some delivery practices may constitute a violation of section 2(a) because they directly or indirectly affect the price paid for the goods. *See, e.g., Corn Products Refining Co. v. FTC.* 324 U.S. 726, 740 (1945); 4 J. von Kalinowski, *supra* §27.03[3], §27.03[4] n.45 and text accompanying. How-

ever, a violation of section 2(a) only arises when "discriminations in the terms of sale [operate] to permit the favored customers to purchase at a lower price than other customers, so that their only practical effect [is] to establish discriminations in price, precisely the evil at which the statute was aimed." *Corn Products*, 324 U.S. at 740. "[T]he act is *inapplicable* to 'terms of sale except as they amount in effect to the indirect discriminations in price within the meaning of the remainder of subsection (a).'" *Id.* (quoting H.R. Rep. No. 2951, 74th Cong., 2d Sess. 5) (emphasis added).

In this case Black Gold does not claim that the untimely deliveries had any effect upon the price it paid Rockwool for blown wool. Accordingly, Rockwool did not violate section 2(a)[4] by discriminating in its deliveries to Black Gold. *See, Howell Industries, Inc. v. Sharon Steel Corp.*, 532 F. Supp. 400, 405-06 (E.D. Mich. 1981).

Black Gold's claim that Rockwool violated the Act by refusing to supply Black Gold with as much blown wool as it required for the PSC program must also fail. This claim in essence alleges a refusal to deal, conduct which does not fall within the proscription of section 2(a). *See L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1120 (5th Cir. 1982); *Naifeh v. Ronson Art Metal Works*, 218 F.2d 202, 206 (10th Cir. 1954); 4 J. von Kalinowski, *supra* §24.03[2][c]. "It is well established that in order to allege a violation of §2(a) one seller must have made at least two actual sales to two actual buyers at different prices." *L & L Oil Co.*, 674 F.2d at 1120. When a seller

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[4]The circuits are split on whether discriminatory deliveries are within the proscription of section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. *See Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 546 (9th Cir. 1983). However, Black Gold has not claimed that the untimely deliveries in this case violated that section of the Act. The scope of section 2(e) is thus not before us and we do not address it.

refuses to sell to one buyer, the requisite price discrimination between two buyers is lacking. *Id.* Although such a refusal may be actionable under other antitrust provisions, see discussion infra part IV, such conduct is outside the scope of section 2(a).

We conclude that the only actions by Rockwool cognizable under section 2(a) are those discriminatory sales, if any, of blown wool and batts actually made to Black Gold which had the requisite effect on competition *outside the PSC program.* Because the PSC program constituted such a large part of Black Gold's installation of blown wool, it is impossible to affirm the general jury verdict in Black Gold's favor. However, because the case must be retried, see part IV infra, Black Gold should have the opportunity to establish any injury occurring outside the PSC program. We therefore turn to Rockwool's argument that the court lacks jurisdiction over any Robinson-Patman claims that did not involve interstate sales.

Section 2(a) requires that one of the alleged discriminatory purchases be "in commerce." " '[A]t least one of the two transactions which, when compared, generate a discrimination [must cross] a state line.' " *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (quoting *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4, 9 (5th Cir. 1969)). "The 'in commerce' requirement, moreover, delimits both the universe of 'persons' who are subject to the Act and the type of transactions that can constitute a violation thereof. Not the alleged violator, merely, but the discrimination sought to be charged must also involve a transaction 'in commerce.' " *S & M Materials Co. v. Southern Stone Co.*, 612 F.2d 198, 200 (5th Cir.), *cert. denied*, 449 U.S. 832 (1980). In addition, the sales under comparison must be reasonably contemporaneous in that they "must (1) have been entered into within a reasonably short time period and (2) contemplate rea-

sonably simultaneous delivery of the goods involved in the transaction." 4 J. von Kalinowski, *supra* §24.03[3]; *see also Castlegate, Inc. v. National Tea Co.*, 34 F.R.D. 221, 229 (D. Colo. 1963). It appears from the stipulated facts in this case that the only sales of insulation crossing a state line involved material from Missouri sold to Black Gold between November 26, 1975 and February 2, 1976. Those sales alone may be used in comparison with other reasonably contemporaneous sales to determine the damages to which Black Gold may be entitled under its section 2(a) price discrimination claim. *See* 4 J. von Kalinowski, *supra* §26.02[2]. Accordingly, the court on remand should consider the Act's "in commerce" requirement in light of the amount of interstate sales revealed in this case.

B. The Sherman 1 Claim.

Black Gold also claimed that Rockwool violated Sherman 1 by entering into a price discrimination conspiracy. However, discriminatory sales that are legal under the Robinson-Patman Act because they do not tend to substantially lessen competition are likewise legal under Sherman 1. "[N]o difference in the criteria for illegality or the mode of analysis follows from the difference between the 'unreasonable' formula of the Sherman Act and the 'substantial lessening of competition' formula of the Clayton Act." 2 P. Areeda and D. Turner, Antitrust Law ¶ 304a (1978). Accordingly, our determination that the discriminatory sales *within the PSC program* did not violate the Robinson-Patman Act for lack of competitive effect is equally applicable to the alleged Sherman 1 violation.

However, there may remain a Sherman 1 price discrimination claim for sales affecting competition outside the PSC program. Although the criteria for illegality in

terms of competitive effect are the same under the Robinson-Patman Act and Sherman 1, the commerce requirements are different. As discussed above, the Robinson-Patman Act requires that one of the discriminatory sales cross a state line. Under the Sherman Act, the alleged conspiracy need only affect interstate commerce. *See generally Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1981) (en banc).

On remand, the district court must determine whether viable price discrimination claims exist pursuant to either the Robinson-Patman Act or Sherman 1 under the standards discussed above.

III.

THE TYING ARRANGEMENT CLAIM

The district court directed a verdict for Rockwool on the claim that Rockwool tied the sale of blown wool to the sale of batts in violation of section 3 of the Clayton Act. In so doing the court found no evidence of the requisite anticompetitive effect.

"A tying arrangement is an agreement by a party to sell one product only on the condition that the buyer also purchase a different or 'tied' product." *Foremost Pro Color*, 703 F.2d at 540. A tying arrangement is unlawful under section 3 of the Clayton Act where its effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. §14. This standard is met if 1) a substantial volume of commerce is foreclosed in the market for the tied product, or 2) the seller possesses economic power in the tying product *and* a not insubstantial volume of commerce is foreclosed in the market for the tied product.[5] 3 J. von Kalinowski,

[5]Under current law, this showing is sufficient to establish the illegality of a tying arrangement under either section 3 of the Clayton Act or section 1 of the Sherman Act. *See Moore v. Jas.*

supra §14.03[3]. Under the second test, a seller has the requisite market power in the tying product if that product is "unique or desirable to customers." *Id.*; *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1215-16 (9th Cir. 1977). The amount of commerce affected in the tied product is measured in terms of dollar volume. 3 J. von Kalinowski, *supra* §14.03[3]. "The relevant figure is the total volume of sales tied and not the portion of sales allocable to the plaintiff." *Moore*, 550 F.2d at 1216; *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 502 (1969).

In this case, the trial judge stated: "I do not believe that either test is met, nor can I see any anticompetitive effect with Rockwool's competitors from any of the evidence that has been presented here." Rec., vol. XV, at 43-44. We need not determine whether the court properly applied the standards discussed above when it directed a verdict for Rockwool on this issue[6] because we conclude that this claim should not have gone to the jury for another reason.

H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977); L. Sullivan, *supra* §152 at 434.

[6]We note that a directed verdict is only proper when, construing the evidence and the inferences therefrom in the light most favorable to the nonmoving party, "all the inferences to be drawn from the evidence are so patently in favor of the moving party that reasonable men could not differ as to the conclusions to be drawn therefrom." *Hidalgo Properties, Inc. v. Wachovia Mortgage Co.*, 617 F.2d 196, 198 (10th Cir. 1980); *see also Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). Under this standard, we do not believe the directed verdict could have been sustained on the ground adopted by the trial court. Rockwool had sufficient market power in the tying product, blown wool, because this product was the only one approved for use in the PSC program. Thus the tying product was both unique and desirable. Moreover, construing the evidence and inferences most favorably to Black Gold, the dollar volume of rockwool batts tied to the sale of blown wool cannot be considered de minimis.

Tying arrangements injure competitors of the seller of the tied product because these competitors are foreclosed from sales as a result of the ties. *Fortner,* 394 U.S. at 498-99; *Moore,* 550 F.2d at 1212 n.4. Tying also has an anticompetitive impact on buyers of the tied product, because their freedom of choice among products competing with the tied product is foreclosed. *Fortner,* 394 U.S. at 499. In this case, Black Gold refused to purchase batts from Rockwool except for a $3919.00 test order. Since Black Gold was neither a buyer nor a competing seller, it did not suffer the competitive injury that section 3 was designed to prevent.

As pointed out above, Black Gold alleges that the primary cause of its injury was Rockwool's refusal to sell blown wool unless Black Gold also bought batts. However, a refusal to deal does not fit within the scope of section 3 of the Clayton Act.

> "[E]ven though the refusal to deal with plaintiff is evidence that [sales to other buyers] are upon the condition which violates Section 3, it is these sales, not the refusal to sell to plaintiff, which constitute the violation; and it is the refusal, not the unlawful sales, which causes plaintiff's injury."

L. Sullivan, *supra* §168 at 488 (footnote omitted). Although a refusal to deal under these circumstances may violate section 1 of the Sherman Act, see part IV infra, courts have been unwilling to extend section 3 of the Clayton Act to a mere refusal to deal, in the absence of an actual sale or lease to the plaintiff. *See Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.,* 637 F.2d 1376, 1388-89 (9th Cir. 1981); *Dillon Materials, Inc. v. Albion Industries,* 567 F.2d 1299, 1306 (5th Cir. 1978); *McElhenney Co. v. Western Auto Supply Co.,* 269 F.2d 332, 337-38 (4th Cir. 1959). *See also* 3 J. von Kalinowski, *supra* §12.05(2) (citing cases). We also decline to do so.

Accordingly, the directed verdict on section 3 of the Clayton Act is affirmed.

IV.

THE CLAIMED REFUSAL TO DEAL

The district court directed a verdict for Rockwool on the claim that Rockwool's refusal to sell Black Gold blown wool violated section 1 of the Sherman Act.[7] The court based its decision on its finding that there was no evidence of a contract, combination, or conspiracy in restraint of trade. Rec., vol. XV, at 44. In reviewing this determination, we must view the evidence most favorably to Black Gold and "give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

Under section 1 of the Sherman Act, only those restraints of trade in the form of a contract, combination, or conspiracy are unlawful. Determining when business conduct provides the requisite combination or conspiracy in the context of an alleged unlawful refusal to deal has proven troublesome. In *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), the Supreme Court established a seller's right to unilaterally refuse to deal with whomever it wishes. Under the *Colgate* doctrine such a unilateral refusal, without more, does not violate Sherman 1 because no combination or conspiracy is involved. However, in cases coming after the articulation of the *Colgate* doctrine, the courts have narrowed the business conduct which *Colgate* protects, while broadening those practices deemed to constitute a conspiracy or combination within

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[7]Section 1 of the Sherman Act provides in relevant part that '[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. §1.

the meaning of Sherman 1. *See generally,* P. Areeda, Antitrust Analysis ¶¶522-527 (3d ed. 1981); L. Sullivan, *supra,* §139; 2 J. von Kalinowski, *supra* §6C.02[1].

Thus in *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960), the Court found that the *Colgate* doctrine did not protect a scheme whereby Parke Davis announced its continuing policy to sell only to wholesalers and retailers who maintained the retail prices specified by Parke Davis, and then actively sought to enforce compliance with its policy.

> "The program upon which Parke Davis embarked to promote general compliance with its suggested resale prices plainly exceeded the limitations of the Colgate doctrine and under Beech-Nut [257 U.S. 441 (1922)] and Bausch & Lomb [321 U.S. 707 (1944)] effected arrangements which violated the Sherman Act. Parke Davis did not content itself with announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded that policy. Instead Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices. The retailers who disregarded the price policy were promptly cut off when Parke Davis supplied the wholesalers with their names. The large retailer who said he would 'abide' by the price policy, the multi-unit Peoples Drug chain, was not cut off. In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act."

Id. at 45 (footnotes omitted). It is apparent from *Parke Davis* that an unlawful combination within the meaning of the Sherman Act exists "if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." *Id.* at 43.

Subsequent to *Parke Davis,* the Supreme Court made it clear that a plaintiff who contends a seller has unlawfully used a refusal to deal as a means of enforcing an anticompetitive practice (such as tying or price-fixing) may establish the requisite combination or conspiracy in either of two ways: by showing that he himself unwillingly complied with the practice, or by showing that although he refused to acquiesce, other buyers agreed to the arrangement under threat of termination. *See Perma Life Mufflers v. International Parts Corp.,* 392 U.S. 134, 142 (1968); *Albrecht v. The Herald Co.,* 390 U.S. 145, 150 n.6 (1968). *See also, Yentsch v. Texaco, Inc.,* 630 F.2d 46, 51-52 (2d Cir. 1980); *Arnott v. American Oil Co.,* 609 F.2d 873, 885 (8th Cir. 1979), *cert. denied,* 446 U.S. 918 (1980).

Black Gold itself refused to buy goods under the alleged unlawful tying arrangement and cannot therefore base the requisite combination or conspiracy on any agreement it had with Rockwool. Under the second method set out above, however, the record contains sufficient evidence supporting the inference of a combination or conspiracy between Rockwool and other buyers to withstand a motion for directed verdict. We note evidence that Rockwool communicated its desire to its customers that they purchase both blown wool and batts, and that Rockwool continued to sell blown wool to Williams and another competitor, both of whom bought batts. However, blown wool sales to Black Gold, which refused to buy batts from Rockwool, were terminated.

The record also contains evidence allowing the inference that Rockwool participated in an attempt to help Williams reacquire a former customer who had transferred its account to Black Gold. Black Gold did not use wool batts with this customer although Williams did.

We conclude that, although a combination has not been established as a matter of law, the evidence is sufficient to send the issue to the jury. Under *Parke Davis* and its progeny, if Rockwool used the refusal to deal with Black Gold to induce adherence by other customers to a tying arrangement that violates the antitrust laws, Rockwool would be liable under section 1 of the Sherman Act for unlawfully combining to restrain trade. Therefore, the directed verdict on Black Gold's claim of unlawful refusal to deal under Sherman 1 is reversed.

V.

CONCLUSION

As noted above, the jury returned a general verdict for Black Gold on the two price discrimination claims. Because we have concluded that these claims were not properly presented to the jury, this verdict must be reversed. We affirm the directed verdict on the alleged tying arrangement, and reverse the directed verdict on the alleged refusal to deal. This action is remanded for further proceedings in light of this opinion.

United States Court of Appeals, Tenth Circuit.

Black Gold, Ltd., a Colorado corporation, Plaintiff-Appellee and Cross-Appellant, v. Rockwool Industries, Inc., a Delaware corporation, Defendant-Appellant and Cross-Appellee. Nos. 80-2098, 80-2143, 82-1176, 82-1177.

Filed: April 18, 1984.

On Rehearing of Appeal from the United States District Court for the District of Colorado (D.C. No. 78-K-578).

Submitted on the briefs:

John W. Madden III and Kenneth R. Bennington of Brownstein Hyatt Farber & Madden, Denver, Colorado; and Thomas D. Smart, Jr. of Smart, DeFurio, Brooks & Eklund, Denver, Colorado, for Black Gold, Ltd.

Jeffrey L. Smith of Cohen, Brame & Smith, Denver, Colorado; John G. Wigmore and Richard C. Neal of Lawler, Felix & Hall, Los Angeles, California, for Rockwool Industries, Inc.

Before DOYLE, MC KAY, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Rockwool has petitioned the panel for rehearing in *Black Gold, Ltd. v. Rockwool Industries, Inc.*, ___ F.2d ___, No. 80-2098 (10th Cir. March 9, 1984), urging us to reconsider our determination that the record contains sufficient evidence of a tying combination or conspiracy to withstand a motion for directed verdict. Rockwool contends that the Supreme Court case of *Monsanto Co. v. Spray-Rite Service Corp.*, 52 U.S.L.W. 4341 (1984), decided after our opinion, compels a contrary result. We disagree and affirm our panel decision with the following addendum.

In *Monsanto* the Court considered what evidence is sufficient to create a jury issue on whether a manufacturer

and some of its distributors were parties to an agreement or conspiracy prohibited by the antitrust laws. Under *Monsanto*, evidence must be produced reasonably tending "to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" 52 U.S.L.W. at 4344 (quoting *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)). Among other things, the Court noted that a threat to cut off a nonacquiescing distributor during a time when the product is in short supply is probative evidence of concerted action because it permits a jury to conclude that the manufacturer "sought this agreement at a time when it was able to use supply as a lever to force compliance." *Id.* at n. 10.

In view of this specific example, we do not construe *Monsanto* as a retreat from those cases holding that a combination occurs between a seller and buyers "whose acquiescence in [the seller's] firmly enforced restraints was induced by 'the communicated danger of termination.'" *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 142 (1968) (quoting *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372 (1967)). In the case before us, the voluminous record contains evidence sufficient to create a jury issue on whether Rockwool used the high demand for blown wool in the PSC program as leverage to obtain acquiescence in an illegal tying arrangement, and whether Black Gold was terminated as "part of or pursuant to that agreement." *Monsanto*, 52 U.S.L.W. at 4345.

We have reviewed Rockwool's other arguments for rehearing and we are not persuaded by them.

APPENDIX "B."

Section 1 of the Sherman Act

(15 U.S.C. §1)

§1. Restraint of trade; resale price maintenance; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914 [15 USCS §45]: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any con-

tract or engage in any combination or conspiracy hereby declared to be illegal shall be demed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act
(15 U.S.C. §15).

§15. Suits by persons injured; recovery of treble damages

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 2(a) of the Clayton Act, as Amended by the Robinson-Patman Act
(15 U.S.C. §13(a)).

§13. Discrimination in price, services, or facilities

(a) Price; cost justification; quantity limits; selection of customers; changing market conditions. It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimi-

nation may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

APPENDIX "C."

Amended Complaint.

In the United States District Court for the District of Colorado.

Black Gold, Ltd., Plaintiff, vs. Rockwool Industries, Inc., Defendant. Civil Action No. 78-K-578.

COMES NOW the Plaintiff, Black Gold, Ltd. (hereinafter, "Black Gold"), a Colorado corporation, by and through its attorneys, Smart, Polumbus, DeFurio & Atkinson, P.C., and Brownstein Hyatt Farber & Madden, and for its Amended Complaint against Defendant Rockwool Industries, Inc. (hereinafter, "Rockwool"), a Delaware corporation, states and alleges as follows:

PRELIMINARY ALLEGATIONS

1. This action arises under the antitrust laws of the United States, more specifically, Section 1 of the Sherman Act, 15 U.S.C. §1; Section 3 of the Clayton Act, 15 U.S.C. §14; and Section 2(a) of the Clayton Act, 15 U.S.C. §13, commonly known as the Robinson-Patman Act. The jurisdiction of this Court is invoked under and is conferred by Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, and 28 U.S.C. §1337.

2. The claims asserted in the Fifth and Sixth Claims for Relief arise under Colorado law pursuant to C.R.S. 1973 §§6-2-108 and 6-4-101 (as amended), respectively. Jurisdiction of this Court is invoked as to such claims pursuant to the doctrine of Pendent or Ancillary jurisdiction.

A. *Parties*

3. The Plaintiff, Black Gold, Ltd., is a corporation organized and existing under the laws of the State of Colorado, with its principal place of business located in Denver, Colorado. Black Gold is engaged in the business of installing residential and commercial insulation, in

both new and existing structures, in the States of Colorado, Wyoming and Kansas. Black Gold has been so engaged since 1950. Black Gold purchases insulation materials regularly from sources in interstate commerce, including purchases from Defendant. More specifically, in addition to its purchases from Defendant, Black Gold purchases in interstate commerce fiberglass insulation, cellulose insulation, machinery, equipment, vehicles, materials and supplies used in the marketing and installation of building insulation.

4. The Defendant, Rockwool Industries, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the State of Colorado. Rockwool is authorized and qualified to do business in the State of Colorado. Rockwool has been and is now engaged in the manufacture, sale and distribution in interstate commerce, of a mineral fiber insulation product commonly known as "rockwool", which is used for residential and commercial insulation. Rockwool manufactures such insulation at various plant locations in the United States, including manufacturing plants located in the States of Colorado and Missouri. Rockwool is the largest manufacturer of rockwool insulation in the United States, and its products are the only rockwool products sold and distributed in significant quantities in Colorado, Kansas and Wyoming.

5. Rockwool manufactures two distinct types of rockwool insulation. One type, known as "blowing wool" insulation, is in a loose form and is typically blown by machine into the attic of an existing structure. It is, consequently, particularly suited for upgrading and increasing the insulation present in existing structures. This process is sometimes referred to as "retrofitting".

6. The second type of insulation manufactured by Rockwool is known as "batt" insulation. It is a pad or

thick strip of rockwool wrapped in paper or foil, and commonly used for insulation in buildings under construction. Batts are usually supplied in rolls from which the needed length is cut and attached between the studs in the construction of a wall, or between the joists in the construction of a ceiling. Thus, batts are particularly suited for use in new construction.

7. Williams Insulation Company of Colorado (hereinafter, "Williams") is a Colorado corporation which is a competitor of Black Gold in the States of Colorado, Wyoming and Kansas. Black Gold and Williams compete in the installation of residential and commercial insulation of all types. Williams has been a customer of Rockwool since well before September 1, 1975.

8. The Public Service Company of Colorado (hereinafter, "PSC") is a public utility engaged in supplying gas and electricity to its customers in the States of Colorado and Wyoming. Between September 1, 1975 and February, 1979, PSC operated a program pursuant to which residential PSC customers were given the opportunity to upgrade the insulation existing in their residences. Through the program, PSC customers could have rockwool, fiberglass or cellulose insulation retrofitted in their residences. PSC maintained a list of qualified insulation installers to whom, on a rotating basis, would be offered individual retrofit insulation jobs in residences in metropolitan Denver. Such installers competed against one another on the basis of their ability to have materials available and ready to install when offered a job by PSC. Only brands and types of insulation specifically approved by PSC could be used by installers working within the PSC program. The rockwool insulation manufactured by Rockwool was at all times during the PSC program the only authorized rockwool insulation. Both Black Gold and Williams were qualified installers in the PSC pro-

gram, and purchased from Rockwool, blowing wool insulation for installations pursuant to the program.

C. *Factual Allegations*

9. In the fall of 1975, shortly after Black Gold was purchased by its current owners, Black Gold notified Rockwool of its desire to begin direct purchase of insulation products including blowing wool marketed by Rockwool. After being informed of Black Gold's substantial needs for blowing wool, Rockwool accepted Black Gold as a Rockwool customer, agreeing that Rockwool would supply all of the blowing wool needed by Black Gold.

10. Black Gold's first order, for blowing wool only, was placed with Rockwool in November, 1975. At the time that order was placed, Rockwool's salesman informed Black Gold that Rockwool wanted Black Gold to purchase batts in addition to blowing wool.

11. Continuing from mid-December, 1975, Rockwool constantly pressured Black Gold to purchase rockwool batts. Although it had not been explicitly stated to Black Gold, Rockwool had conditioned the purchase of blowing wool on Black Gold's purchase of batts. Upon Black Gold's failure to meet this condition, Rockwool attempted to force compliance by various means, including a refusal to fill all of Black Gold's blowing wool orders, in effect terminating Black Gold as a Rockwool customer over a period of time ending in July, 1977.

12. During the time Black Gold was a Rockwool customer, Black Gold purchased from Rockwool 33,481 bags of blowing wool, for which Black Gold paid approximately $85,099.00. During the same period, Williams purchased 88,873 bags of blowing wool, for which it paid approximately $206,193. At all times Black Gold paid between $0.10 and $0.45 more per bag for blowing wool than was paid by Williams.

13. Of Black Gold's total purchases, 14,143 bags of blowing wool, for which Black Gold paid approximately $33,943.00, were shipped interstate from Rockwool's Cameron, Missouri plant between November 26, 1975 and February 2, 1976. Of Williams' total purchases, 5,766 bags of blowing wool, for which Williams paid approximately $12,685.00, were shipped from Rockwool's Missouri Plant between December 3, 1975 and January 14, 1976. For blowing wool shipped from Missouri, Black Gold paid $2.40 per bag, while Williams paid $2.20 per bag.

14. During the period covered by the Complaint, top Williams officials would meet with Rockwool management on a regular basis to assess market conditions and determine the "actual" price to be paid by Williams for Rockwool products. In contrast to the practice with respect to Black Gold, the entire function of setting prices for Williams was handled by Rockwool's top officials.

15. In early spring, 1976, Black Gold began to find its orders frequently "bumped" or rescheduled by Rockwool. In contrast, Williams was not having similar experience, and was, in fact, receiving in a timely manner all of Rockwool products it needed. By late spring, 1976, the backlog of Black Gold's blowing wool orders was so large that Black Gold decreased its attempts to order additional blowing wool.

16. Between February and November, 1976, Rockwool sold approximately 44,305 bags of blowing wool to Williams, while Black Gold was sold only 12,817 bags. During the entire period in which Black Gold was a Rockwool customer, Williams was sold 88,873 bags of blowing wool, while Black Gold was sold 33,481 bags.

17. By mid-July of 1976, Black Gold was in the position of having to turn away rockwool blowing wool jobs

offered by PSC because of its inability to purchase enough blowing wool from Rockwool to do all the PSC jobs offered. By comparison to Williams, during the course of the PSC program Black Gold turned away approximately 1,267 jobs requiring rockwool blowing wool. Those jobs represented approximately $40,000.00 in sales to Black Gold.

18. Since the PSC program was the more profitable use of what blowing wool Black Gold could purchase from Rockwool, approximately 95% of Black Gold's rockwool blowing wool went into the PSC program. As a result, in addition to the jobs turned away within the PSC program, Black Gold was foreclosed from approximately $40,000.00 in rockwool blowing wool jobs outside the PSC program; this blowing wool business from which Black Gold was foreclosed could have originated in Kansas and Wyoming, as well as Colorado.

19. During the period covered by this Complaint, Rockwool granted Williams allowance for picking up its own orders at the Rockwool plant. A pickup allowance was neither offered nor granted to Black Gold until March, 1977.

20. During the time that Black Gold was a Rockwool customer, it also received different treatment from Rockwool regarding repayment terms. Rockwool enforced terms of "2%, 10th Prox, Net and Due Thereafter" on Black Gold invoices. However, with respect to Williams, those terms were not enforced, and Williams received the 2% discount even though payment took place as much as 7-10 weeks after the invoice date.

21. In November, 1976, Rockwool's pressure on Black Gold to buy batts became a clear condition that if Black Gold bought batts, it would get the blowing wool it needed from Rockwool. In January, 1977, Black Gold was formally informed that Rockwool policy was that for every

truckload of batts, a truckload of blowing wool must come with it. That policy was repeated by Rockwool personnel on numerous subsequent occasions.

22. Beginning March 15, 1977, Black Gold purchased batts from Rockwool. Black Gold purchased a total of $3,671.53 in batts before it was terminated as a Rockwool customer. The price paid by Black Gold for the batts purchased was 12% higher than the price paid by Williams.

23. In July, 1977, Black Gold was informed that although it was faced with turning away PSC jobs, it would not get additional blowing wool since it was not a full-line Rockwool applicator and was not purchasing enough Rockwool batts. At that time, Black Gold was informed that it had been terminated as a Rockwool customer.

24. Between December, 1975 and August, 1977, Williams reported completion of approximately 1,041 rockwool blowing wool jobs in the PSC program, while Black Gold reported completion of approximately 628. From June, 1976, when Rockwool began to decrease its shipments of blowing wool to Black Gold, until approximately August, 1977, when Black Gold did its last PSC blowing wool job, Black Gold reported completion of 243 blowing wool jobs in the PSC program; during the same period, Williams reported completion of 769 jobs in the PSC program.

25. Subsequent to August, 1977, Williams reported completion of 713 blowing wool jobs in the PSC program.

FIRST CLAIM FOR RELIEF

26. Plaintiff repeats and incorporates herein each allegation contained in paragraphs 3 through 25 above.

27. Since on or about November 26, 1975, Defendant Rockwool has directly and indirectly engaged in price

discrimination in violation of §2(a) of the Robinson-Patman Act, in the sale of rockwool insulation. More specifically:

(a) Rockwool has discriminated against Black Gold by selling blowing wool to Williams at unit prices lower than the prices charged Black Gold for the contemporaneous purchase of like grade and quality of blowing wool;

(b) Rockwool has discriminated against Black Gold in the terms required for Black Gold's purchases of blowing wool, by conditioning Black Gold's purchase of blowing wool on the purchase of rockwool batts, while not requiring such conditions for Williams' contemporaneous purchases of like grade and quality blowing wool;

(c) Rockwool has discriminated against Black Gold by selling batts to Williams at unit prices lower than the unit prices charged Black Gold for the contemporaneous purchase of like grade and quality batts;

(d) Rockwool has discriminated against Black Gold in the terms granted for Black Gold's purchases of rockwool insulation, by not enforcing invoice payment terms with respect to purchases by Williams, while strictly enforcing such terms with respect to Black Gold's contemporaneous purchases of rockwool insulation of like grade and quality;

(e) Rockwool has discriminated against Black Gold in the terms granted for Black Gold's purchases of rockwool insulation, by giving Williams an allowance for picking up its own orders at the Rockwool plant, while neither offering nor granting such an allowance to Black Gold with respect to its contemporaneous purchases of rockwool insulation of like grade and quality.

28. Defendant Rockwool is a person within the meaning of the Robinson-Patman Act, engaged in commerce. In the course of such commerce, Rockwool engaged in the discrimination set forth in paragraph 27 above, with a substantial number of the purchases involved, being in interstate commerce. All the purchases involved in the discrimination alleged herein, involve commodities sold for use, consumption and resale within the United States.

29. The discrimination alleged above has substantially lessened competition in commerce with respect to rockwool insulation installation, has tended to create a monopoly in the installation of insulation, and has prevented and injured Black Gold's ability to compete with Williams in the installation of insulation in the states of Colorado, Wyoming and Kansas.

30. As a direct and proximate result of Rockwool's violations of §2(a) of the Robinson-Patman Act, Black Gold has been injured and has suffered damages in the amount of One Million Dollars in its business and property, and unless Rockwool is restrained by this Court from continuing such violations, Black Gold will be irreparably damaged.

31. Under and pursuant to the provisions of §4 of the Clayton Act, 15 U.S.C. §15, Black Gold is entitled to recover from Rockwool treble damages, together with costs of this suit and reasonable attorneys' fees.

32. Under and pursuant to the provisions of §16 of the Clayton Act, 15 U.S.C. §26, Black Gold is entitled to an injunction restraining and enjoining Rockwool from engaging in any further violations of the §2(a) of the Robinson-Patman Act.

WHEREFORE, Plaintiff prays for judgment in its favor on its First Claim for Relief and against Rockwool in the amount of One Million Dollars actual damages, treble damages, an Order of this Court ordering that

Defendant be enjoined from discriminating in price against Plaintiff in violation of §2(a) of the Robinson-Patman Act, interest, costs of this action, reasonable attorneys' fees, and such other relief as this Court may deem just and proper.

SECOND CLAIM FOR RELIEF

33. Plaintiff repeats and incorporates herein each allegation contained in paragraphs 3 through 25 above.

34. Defendant Rockwool, and Williams, have contracted, combined and conspired to restrain trade in the sale and installation of rockwool insulation in violation of §1 of the Sherman Act. More specifically, Rockwool and Williams have engaged in a conspiracy to enhance the competitive position of Williams in the market for residential and commercial insulation installation, and create for Williams a competitive advantage over other installers of such insulation. In furtherance of that conspiracy, Rockwool and Williams have agreed that Rockwool would grant to Williams unit prices for blowing wool and batts lower than the published list prices charged by Rockwool in the normal course of its business. Such prices granted to Williams were at all times lower than the prices charged Black Gold.

35. The agreement entered into between Rockwool and Williams is in restraint of trade and commerce among the several states. More specifically:

(a) The agreement between Rockwool and Williams occurred in commerce since it directly involved transactions which were themselves in commerce;

(b) The agreement between Rockwool and Williams substantially and adversely affected interstate commerce by (i) foreclosing Black Gold from transacting business in Kansas, Wyoming and Colorado, (ii) restraining services supplied by Black Gold

which are an integral part of interstate financing transactions, and (iii) affecting a substantial number of transactions which were themselves in interstate commerce; and

(c) The agreement between Rockwool and Williams substantially and adversely affected interstate commerce since it involved the intrastate sales of an interstate seller.

36. As a direct and proximate result of Rockwool's violations of §1 of the Sherman Act, Black Gold has been injured and has suffered damages in the amount of One Million Dollars in its business and property, and unless Rockwool is restrained by this court from continuing such violations, Black Gold will be irreparably damaged.

37. Under and pursuant to the provisions of §4 of the Clayton Act, 15 U.S.C. §15, Black Gold is entitled to recover from Rockwool treble damages together with costs of this suit and reasonable attorneys' fees.

38. Under and pursuant to the provisions of §16 of the Clayton Act, 15 U.S.C. §26, Black Gold is entitled to an injunction restraining and enjoining Rockwool from engaging in any further violations of §1 of the Sherman Act.

WHEREFORE, Plaintiff prays for judgment in its favor on the Second Claim for Relief and against Rockwool in the amount of One Million Dollars actual damages, treble damages, an Order of this Court ordering that Defendant be enjoined from engaging in the conduct alleged in this Claim for Relief, interest, costs of this action, reasonable attorneys' fees, and such other relief as this Court may deem just and proper.

THIRD CLAIM FOR RELIEF

39. Plaintiff repeats and incorporates herein each allegation contained in paragraphs 3 through 25 above.

40. Since on or about November 26, 1975, Rockwool has imposed a tying arrangement on Black Gold in violation of Section 3 of the Clayton Act. More specifically, Rockwool has: a) contracted to sell blowing wool to Black Gold on the condition that Black Gold purchase a like quantity of batts, and (b) has sold blowing wool to Black Gold on the condition, agreement and understanding that Black Gold produce a like quantity of batts.

41. Tying the sale of blowing wool to the sale of batts, amounted to a condition, agreement or understanding that Black Gold would not deal in the goods of a competitor of Rockwool.

42. The subject of the tying arrangement imposed by Rockwool was goods, as such are defined under §3 of the Clayton Act.

43. Rockwool is a person engaged in commerce, and was acting in the course of such commerce when it imposed the tying arrangement set forth above. More specifically:

(a) Rockwool's conduct occurred in commerce since it directly involved transactions which were themselves in commerce;

(b) Rockwool's conduct occurred in and affected commerce since it involved the intrastate sales of an interstate seller;

(c) Rockwool's conduct substantially and adversely affected interstate commerce by foreclosing Black Gold from transacting business in Kansas, Wyoming and Colorado, by restraining services supplied by Black Gold which are an integral part of interstate financing transactions, and by affecting a substantial number of transactions which were themselves in interstate commerce.

44. The effect of the tying arrangement alleged above has been to create a reasonable probability of a substantial lessening of competition in lines of commerce involving rockwool insulation products.

45. As a direct and proximate result of Rockwool's violations of §3 of the Clayton Act, Black Gold has been injured and has suffered damages in the amount of One Million Dollars in its business and property, and unless Rockwool is restrained by this Court from continuing such violations, Black Gold will be irreparably damaged.

46. Under and pursuant to the provisions of §4 of the Clayton Act, 15 U.S.C. §15, Black Gold is entitled to recover from Rockwool treble damages together with costs of this suit and reasonable attorneys' fees.

47. Under and pursuant to the provisions of §16 of the Clayton Act, 15 U.S.C. §26, Black Gold is entitled to an injunction restraining and enjoining Rockwool from engaging in any further violations of §3 of the Clayton Act.

WHEREFORE, Plaintiff prays for judgment in its favor on the Second Claim for Relief and against Rockwool in the amount of One Million Dollars actual damages, treble damages, an Order of this Court ordering that Defendant be enjoined from engaging in the conduct alleged in this Claim for Relief, interest, costs of this action, reasonable attorneys' fees, and such other relief as this Court may deem just and proper.

FOURTH CLAIM FOR RELIEF

48. Plaintiff repeats and incorporates herein each allegation contained in paragraphs 3 through 25, and 40 through 42 above.

49. In July, 1977, Rockwool terminated Black Gold as a Rockwool customer. That refusal to deal was in furtherance of, and was a result of, the illegal tying arrangement alleged in paragraphs 40 through 42 above.

50. Rockwool's refusal to deal with Black Gold, and the tying arrangement alleged in paragraphs 40 through 42 above, amounted to a contract, combination or conspiracy in restraint of trade in the sale of rockwool insulation. Such conduct restrained trade and commerce among the several states; more specifically:

(a) Such conduct occurred in commerce since it directly involved transactions which were themselves in commerce;

(b) Such conduct substantially and adversely affected interstate commerce by (i) foreclosing Black Gold from transacting business in Kansas, Wyoming and Colorado, (ii) restraining services supplied by Black Gold which are an integral part of interstate financing transactions, and (iii) affecting a substantial number of transactions which were themselves in interstate commerce; and

(c) Such conduct substantially and adversely affected interstate commerce since it involved the intrastate sales of an interstate seller.

51. As a direct and proximate result of Rockwool's violations of §1 of the Sherman Act, Black Gold has been injured and has suffered damages in the amount of One Million Dollars in its business and property, and unless Rockwool is restrained by this court from continuing such violations, Black Gold will be irreparably damaged.

52. Under and pursuant to the provisions of §4 of the Clayton Act, 15 U.S.C. §15, Black Gold is entitled to recover from Rockwool treble damages together with costs of this suit and reasonable attorneys' fees.

53. Under and pursuant to the provisions of §16 of the Clayton Act, 15 U.S.C. §26, Black Gold is entitled to an injunction restraining and enjoining Rockwool from engaging in any further violations of §1 of the Sherman Act.

WHEREFORE, Plaintiff prays for judgment in its favor on the Fourth Claim for Relief and against Rockwool in the amount of One Million Dollars actual damages, treble damages, an Order of this Court ordering that Defendant be enjoined from engaging in the conduct alleged in this Claim for Relief, interest, costs of this action, reasonable attorneys' fees, and such other relief as this Court may deem just and proper.

FIFTH CLAIM FOR RELIEF

54. Plaintiff repeats and incorporates herein each of the allegations contained in paragraphs 3 through 25, and the allegations contained in the First Claim for Relief, above.

55. By reason of the discriminatory conduct alleged in the First Claim for Relief, Defendant Rockwool has violated the provisions of Colo. Rev. Stat. 1973 §6-2-108 (as amended) (hereinafter §6-2-108).

56. As a result of Defendant's violation of §6-2-108, Plaintiff has been injured in the amount of approximately One Million Dollars in its business and property.

57. Under and pursuant to the provisions of Colo. Rev. Stat. 1973 §6-2-111(1), Black Gold is entitled to recover from Defendant damages it has sustained by reason of Defendant's violation of provisions of §6-2-108.

58. Under and pursuant to the provisions of Colo. Rev. Stat. §6-2-111(1), Black Gold is entitled to an injunction against Defendant's further violations of §6-2-108.

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendant in the amount of One Million Dollars, actual damages, an Order of this Court enjoining Defendant during the pendancy of this litigation and permanently from violating §6-2-108, and such other relief as this Court deems just and proper.

SIXTH CLAIM FOR RELIEF

59. Plaintiff repeats and incorporates herein each of the allegations contained in paragraphs 3 through 25, and the allegations contained in the Second and Fourth Claims for Relief, above.

60. By reason of the concerted conduct alleged in the Second and Fourth Claims for Relief, Defendant Rockwool has violated the provisions of Colo. Rev. Stat. 1973 §6-4-101 (as amended) (hereinafter §6-4-101).

61. As a result of Defendant's violation of §6-4-101, Plaintiff has been injured in the amount of approximately One Million Dollars in its business and property.

62. Under and pursuant to the provisions of Colo. Rev. Stat. 1973 §6-4-108, Black Gold is entitled to recover from Defendant damages it has sustained by reason of Defendant's violation of provisions of §6-4-101.

63. Under and pursuant to the provisions of Colo. Rev. Stat. §6-4-105, Black Gold is entitled to an injunction against Defendant's further violations of §6-4-101.

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendant in the amount of One Million Dollars, actual damages, an Order of this Court enjoining Defendant during the pendancy of this litigation and permanently from violating §6-4-101, and such other relief as this Court deems just and proper.

SEVENTH CLAIM FOR RELIEF

64. Plaintiff repeats and incorporates herein each of the allegations contained in paragraphs 3 through 25, and the allegations contained in the Third Claim for Relief, above.

65. By reason of the tying arrangement alleged in the Third Claim for Relief, Defendant Rockwool has violated the provisions of Colo. Rev. Stat. 1973 §6-4-101 (as amended) (hereinafter §6-4-101).

66. As a result of Defendant's violation of §6-4-101, Plaintiff has been injured in the amount of approximately One Million Dollars in its business and property.

67. Under and pursuant to the provisions of Colo. Rev. Stat. 1973 §6-4-108, Black Gold is entitled to recover from Defendant damages it has sustained by reason of Defendant's violation of provisions of §6-4-101.

68. Under and pursuant to the provisions of Colo. Rev. Stat. §6-4-105, Black Gold is entitled to an injunction against Defendant's further violations of §6-4-101.

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendant in the amount of One Million Dollars, actual damages, an Order of this Court enjoining Defendant during the pendancy of this litigation and permanently from violating §6-4-101, and such other relief as this Court deems just and proper.

The Demand for Jury Trial made in the original Complaint is repeated and incorporated herein.

DATED at Denver, Colorado this 18th day of October, 1979.

Respectfully submitted,

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